

FILED *for*  
*Rhs*

JUL 27 2005

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION

JOHN F. CORCORAN, CLERK  
BY: *H McDonald*  
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TYRONE LAMONT SMITH,	)	
Petitioner,	)	Civil Action No. 7:05cv00445
	)	
v.	)	<u>MEMORANDUM OPINION AND</u>
	)	<u>ORDER</u>
	)	
UNITED STATES OF AMERICA,	)	By: Jackson L. Kiser
Respondent.	)	Senior United States District Judge

Petitioner, a federal inmate proceeding pro se, has submitted to the court this motion to vacate, set aside or correct sentence, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. By order entered on April 27, 1998, this court denied relief on Smith's first motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255. See Civil Action No. 7:97cv00416.

In this petition, Smith requests re-sentencing as a result of a new constitutional rule announced in the Supreme Court's opinions in Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and United States v. Booker, 125 S. Ct. 738 (Jan. 12, 2005). Because the claims presented in the instant motion directly attack Smith's underlying criminal conviction, I conclude that this Rule 60(b) motion amounts to a successive application for relief under 28 U.S.C. § 2255.<sup>1</sup> Therefore, the petition falls under the provisions of the recent amendments to federal habeas statutes regarding subsequent or successive §2255 motions. See Title I, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). Under these amendments, this court may consider a second or successive §2255 motion only upon specific certification from the United States Court of Appeals for the Fourth Circuit that the claims in the motion meet certain

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<sup>1</sup>The court must review "Rule 60(b) motions received in collateral review cases to determine whether such motions are tantamount to successive applications" for relief under 28 U.S.C. § 2255. United States v. Wine stock, 340 F.3d 200, 206 (4th Cir. 2003).

criteria. As petitioner has not submitted any evidence of such certification by the Court of Appeals, it is hereby

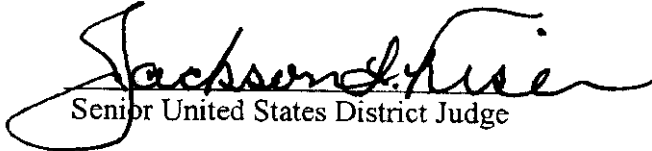
**ORDERED**

that petitioner's motion is **DENIED**.

Petitioner is hereby advised of the procedure for obtaining certification from the United States Court of Appeals for the Fourth Circuit to have this court review a successive § 2255 motion. Petitioner must submit a copy of successive § 2255 motion to the Court of Appeals, along with a motion requesting a three-judge panel certification that the district court may review the successive § 2255 motion. See 28 U.S.C. § 2244 (as amended, 1996). A Fourth Circuit form and instructions for filing this motion will be included with this notice or are available from the Fourth Circuit at the following address: Office of the Clerk, United States Court of Appeals for the Fourth Circuit, 900 E. Main St., Richmond, VA 23219.

The Clerk is directed to send certified copies of this order to petitioner and to strike the case from the active docket of the court.

ENTER: This 27<sup>th</sup> day of July, 2005.

  
Senior United States District Judge